> In the circumstances I think that the application of the defendant should be granted. He has explained that he searched the cause lists for the action and was misled as to the day of the trial. He made an excusable mistake, and he ought not to suffer unnecessarily for it. I order that the action be restored to the list, and I will try it myself. The defendant however must pay the costs thrown away.

Mr Tony Dhana next referred to *Gatti* v *Shoosmith*.[7] In that case the applicant was applying for extension of time to enter his appeal. The applicant was a few days late in entering his appeal and the reason for the delay as explained in an affidavit, was the mistake of the solicitors. The English Court of Appeal allowed the extension of time and leave to appeal was given. The third case relied upon by Mr Tony Dhana was *Palata Investments Ltd & Ors* v *Burt & Sinfield Ltd & Ors*.[8] The headnote of that case reads as follows:

> When considering an application under RSC O 59 r 14(12) for an extension of time for appealing beyond the time limit specified in O 59 r 4(1) of four weeks from the date on which the judgment or order of the court below was signed, entered or otherwise perfected, the discretion of the Court of Appeal is unfettered and will be exercised and there is an acceptable excuse for it, the court will not as a general rule deprive the appellant of his right of appeal, and in such a case it will not be necessary for the court to consider the merits of the appeal.

It will be noted that in the *Gatti* case[7] and *Palata* case,[8] although the delay was due to the mistake of the solicitor the Court of Appeal allowed the extension of time.

The Federal Court, however, has taken a different stand. In *Tractors Malaysia Bhd* v *Southern Estates Sdn Bhd & Anor*,[9] Mohamed Azmi FJ, as he then was, in delivering the judgment of the Federal Court said at p 121:

> In the Federal Court we rule that mistake of appellants' solicitors on point of law by itself cannot constitute sufficient grounds for granting extension of time to file notice of appeal.

See *Sri Jaya Transport Co Ltd* v *Fernandez*.[10] In *Gan Hay Chong* v *Siow Kian Yuh & Anor*,[11] the Federal Court held that the mistake of the appellant's solicitors in that case did not constitute a sufficient ground for granting the extension of time. In *Hoe Joe Sawmills* v *Sigma (Air Conditioning) Sdn Bhd*,[12] the reason given for the application for extension of time, was the fault of the solicitor's clerk. The Federal Court decided that this was insufficient ground for the granting of special leave.

Although *Tractors Malaysia* v *Southern Estates*,[9] *Sri Jaya Transport* v *Fernandez*,[10] and *Gan Hay Chong* v *Siow Kian Yuh*[11] were concerned with applications for extension of time to file notice of appeal to the Federal Court, in my view the principles laid down in those cases apply to the present case. There are two points to be noted in the Federal Court decisions. Firstly, the mistake of the appellant's solicitors or the solicitor's clerk is not sufficient ground to grant an extension of time. Secondly, in all those three cases affidavits were filed in support of the application for extension of time and the Federal Court took into consideration the affidavits filed in arriving at its decision. Even in the *Gatti* case[7] and *Palata* case,[8] the English Court of Appeal relied on the explanation contained in the applicants' affidavits before making its decision.

In the present case, when I dismissed the appeal by the first and third defendant on 20 November 1989, there was a solicitor on record but he was absent. He had not filed any affidavit to explain or to give reasons why he was absent. As stated earlier the second defendant's averment for and on behalf of the first defendant in his affidavit is inadmissible. The explanation in the affidavit on the absence of the third defendant is not sufficient ground to grant the extension of time.

In the absence of an affidavit giving sufficient grounds to justify an extension of time to enable the first and third defendants to apply for further argument, the second application was dismissed with costs.

Application dismissed.

Solicitors: *Tony Dhana & Co; Soo Thien Ming & Shahrizat.*

Reported by *Mathavan Devadas*

Kin Moh Sdn Bhd v Mahashukor Palmoil Industries Sdn Bhd

HIGH COURT (JOHORE BAHRU) — COMPANIES WINDING-UP NO 42-20 OF 1985
ABU MANSOR J
31 JANUARY 1990

Companies and Corporations — Winding-up — Payment of petitioner's taxed cost — Payment to be made out of company's assets — Payment to be made by liquidators under previous court order — Receiver and manager not liable — Companies Act 1965, s 292

The petitioner applied by notice of motion on 14 December 1988 for an order that the taxed costs of the winding-up petition against the respondent be paid by the respondent's liquidator or receiver and manager out of the proceeds of the sale of the respondent's assets. The petitioner contended that since the respondent's assets were taken by the receiver and manager and the liquidator was left with nothing, the taxed costs should be paid by the former who had opposed the winding-up petition but were unsuccessful. The petitioner further argued that the taxed costs had to come from the respondent's assets which, within the meaning of s 267 of the UK Companies Act, included property which were subject to a floating charge prior to the winding-up. Such assets would form part of the assets of the respondent which were applicable first, in the payment of costs and expenses of the winding-up.

Held, dismissing the petitioner's motion:

(1) It would be contrary to the terms of the order made by the court on 5 March 1986 where taxed costs were to be paid by the liquidator, if the court now ordered that payment be made by the receiver and manager.

(2) That order of court had long been perfected and was crystal clear. It was clear law that this court was functus officio. It was not in the power of the court to have that order of court amended to include an order that the receiver and manager must pay the taxed costs. An order now that the liquidator must pay costs is academic and repetitive.

(3) It is clearly a case where a competent court had dealt with the case and had considered the matter of costs and duly made an order as to who is to pay and how it is to be settled. The submission that the court has discretion to order costs should not be considered in this situation.

[Bahasa Malaysia summary

Pempetisyen memohon dengan notis usul pada 14 Disember 1988 untuk satu perintah supaya kos yang ditetapkan untuk petisyen penggulungan terhadap responden dibayar oleh penyelesai atau penerima dan pengurus responden dari hasil penjualan aset-aset responden. Pempetisyen berhujah bahawa oleh sebab aset-aset responden diambil oleh penerima dan pengurus dan penyelesai tidak mendapat sebarang aset, maka kos yang ditetapkan sepatutnya dibiayai oleh penerima dan pengurus yang juga telah gagal menghalang petisyen penggulungan. Pempetisyen juga menghujah bahawa kos yang ditetapkan itu harus dibayar dari aset responden yang mengikut makna s 267 Akta Syarikat UK termasuk aset yang tertakluk kepada satu caj terapung sebelum penggulungan. Aset-aset sedemikian akan membentuk sebahagian daripada aset responden yang akan digunakan dahulu dalam membayar kos dan perbelanjaan penggulungan.

Diputuskan, menolak usul pempetisyen:

(1) Adalah bertentangan dengan terma di dalam perintah yang telah dibuat oleh mahkamah pada 5 Mac 1986 yang mengenakan kos yang ditetapkan dibayar oleh penyelesai jika mahkamah kini membuat perintah supaya pembayaran dibuat oleh penerima dan pengurus.

(2) Perintah mahkamah telah begitu lama disempurnakan dan adalah begitu jelas. Adalah jelas di bawah undang-undang bahawa mahkamah telah functus officio. Mahkamah tidak mempunyai kuasa untuk memindah perintah asal itu supaya satu perintah tambahan dimasukkan yang mengkehendaki penerima dan pengurus membayar kos yang ditetapkan. Satu perintah sekarang bahawa penyelesai mesti membayar kos adalah akademik dan bersifat mengulangi.

(3) Adalah jelas bahawa ini merupakan kes yang sebuah mahkamah yang berkemampuan telah menyelesaikan kes itu. Mahkamah telah menimbangkan hal berkenaan kos dan membuat perintah untuk menentukan siapa yang harus membayar kos dan cara ia perlu diselesaikan. Hujah bahawa mahkamah mempunyai budibicara untuk membuat perintah kos tidak seharusnya dipertimbangkan dalam keadaan ini.]

Cases referred to

1 *Cetico Sdn Bhd* v *The Tropical Veneer Co Bhd* [1988] 2 MLJ 665 (refd)

2 *Re Barleycorn Enterprises Ltd; Mathias and Davies (A Firm)* v *Down (Liquidator of Barleycorn Enterprises Ltd)* [1970] 2 All ER 155 (distd)

Legislation referred to

Companies Act 1965 s 292

Ong Ban Chai for the petitioner.
Prasad Abraham for the respondent.

Cur Adv Vult

Abu Mansor J: By the petitioner/applicant's amended notice of motion dated 14 December 1988, the petitioner applied for an order that the costs of this petition taxed at $7,779.50 plus $315, which was the taxing fee and allocatur, be paid by the liquidator or Anuarul Aini bin Mohd Perai of Anuarul Azizan & Co, the receiver and manager of the respondent company to the petitioner and or its solicitors out of the proceeds of the sale of the assets of the respondent company. This application is opposed by the receiver and manager and after hearing arguments I adjourned the matter to a date to be fixed for a decision.

The facts are as follows. The petitioner applied for the winding-up of the respondent company. The petition for winding-up was opposed by the debenture holders' receiver and manager, Anuarul Azizan & Co. After hearing the parties, the court overruled the opposition and duly made an order for winding-up with costs to the petitioner to be taxed.

Mr Ong Ban Chai for the petitioner/applicant contended that since the assets of the company were taken by the receiver and manager and the liquidator was left with nothing he argued that the taxed costs should therefore be paid by the receiver and manager who held the assets of the company. For this proposition he cited *Cetico Sdn Bhd* v *The Tropical Veneer Co Bhd*[1] where in that case UMBC were secured creditors. The other unsecured creditors, including the petitioner, presented a petition for the respondent's winding-up and UMBC applied to dismiss the petition but were unsuccessful. The applicant cited p 666 where Shankar J gave an order that the costs of this application be taxed and paid by UMBC to the petitioner and the other supporting creditors. The applicant's counsel says likewise. Since the receiver and manager opposed this winding-up petition, he must pay the petitioner's taxed costs.

Counsel for the petitioner further argued that the taxed costs have to come from the company's assets. As to the meaning of the company's assets, counsel cited *Re Barleycorn Enterprises Ltd; Mathias and Davies (A firm)* v *Down (Liquidator of Barleycorn Enterprises Ltd)*[2] where it was held that the word 'assets' in s 267 of the Companies Act [UK] and r 195(1) of the Companies (Winding-up) Rules 1949 [UK] included property which was subject to a floating charge. The legislature no longer regarded property subject to a charge as belonging wholly to the debenture holder on a winding-up and such property formed part of the assets of the company which were applicable first, in the payment of

the costs and expenses of the winding-up, secondly, in payment of preferential claims and only thirdly, in payment of the debenture holder's claims.

Counsel therefore submitted that since the receiver and manager sold the company's assets without reporting to anyone and without paying the costs of the petition, the receiver and manager having opposed the petition, they must pay the taxed costs. Following the case cited by him, the costs have to be from the company's assets.

Alternatively, if the court is not with the petitioner's counsel's submission, the petitioner is still entitled to costs since the receiver and manager had unsuccessfully opposed the petition.

Mr Abraham, counself for the receiver and manager, opposed this application for payment of the taxed costs on the ground that the court order (encl 55) did not provide for payment of such costs. The order (encl 55) was made after hearing the objection by the receiver and manager and the said order, amongst others, provided that the petitioner was to get costs to be taxed and paid by the appointed liquidator out of the assets of the company.

Mr Abraham contended that if it was the case that costs were to be paid by the receiver and manager who were appointed by the debenture holders then this matter should have been raised before the court made the order as to costs. As a matter of fact he contended that the applicant's counsel in making the present application was really applying to have the court order dated 5 March 1986 amended. Strictly speaking, by the terms of that 5 March 1986 order, even if the costs were to be paid out of the assets of the company, it is the liquidator who must pay after attempting to obtain it from the receiver and manager.

The respondent's counsel contended that the *Re Barleycorn* case[2] is no authority and should be disregarded as the provisions of the English Act and our provision differ materially. *Barleycorn*'s case[2] was based on an interpretation of s 319 of the Companies Act [UK] which section is s 292(1) of our Act which reads:

> Subject to this Act, in a winding up there shall be paid in priority to all other unsecured debts —
>
> (a) firstly, the costs and expenses of the winding up including the taxed costs of a petitioner payable under section 220, the remuneration of the liquidator and the costs of any audit carried out pursuant to section 281;
>
> (b) secondly, all wages or salary (whether or not earned wholly or in part by way of commission) including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment, of any employee not exceeding one thousand five hundred ringgit or such other amount as may be prescribed from time to time whether for time or piecework in respect of services rendered by him to the company within a period of four months before the commencement of the winding up;
>
> (c) thirdly, all amounts due in respect of worker's compensation under any written law relating to worker's compensation accrued before the commencement of the winding up;
>
> (d) fourthly, all remuneration payable to any employee in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before the commencement of the winding up;
>
> (e) fifthly, all amounts due in respect of contributions payable during the twelve months next before the commencement of the winding up by the company as the employer of any person under any written law relating to employees superannuation or provident funds or under any scheme of superannuation or retirement benefit which is an approved scheme under the federal law relating to income tax; and
>
> (f) sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired.

He submitted that our legislature had decided to provide a different provision for exclusively unsecured debts in s 292 and in the process it excludes or leaves out of that section the priorities of secured creditors.

He further submitted that the answer to the complaint of the petitioner is to be found in s 292(4) of the Companies Act 1965:

> So far as the assets of the company available for payment of general creditors are insufficient to meet any preferential debts specified in subsection (1)(b), (d) and (e) and any amount payable in priority by virtue of subsection (3), those debts shall have priority over the claims of the holders of debentures under any floating charge created by the company, and shall be paid accordingly out of any property comprised in or subject to that charge.

It is to be noted when the available assets are insufficient, the claims with priority spelt out by that subsection that must be paid out are items (b), (d) and (e) which relate to wages or claims of workmen but significantly (a) (costs in s 292(1)) had clearly been left out in considering priorities of claims. Similar to the present situation, where there are insufficient assets to pay for preferential debts, if payments were still to be made, then only items (b), (d) and (e) — relating to wages of workmen — are to be paid. The costs of the winding-up, in a situation under s 292(4) where there is insufficient money to pay, is not an item to be paid as a priority claim.

As regards the decision on *Barleycorn*'s case,[2] it was a decision on interpretation of s 319 of the Companies Act [UK] which is in pari materia to our s 292(1) Companies Act 1965. This section of the Companies Act deals with the procedure in a voluntary winding-up. It therefore has no relevance to the problem posed now and he therefore applied that the motion be dismissed with costs.

As for the claim that the receiver and manager pay the taxed costs, I agree with the submission of his counsel that the motion should be dismissed on the ground that it would be contrary to the terms of the order made by the court on 5 March 1986 where the taxed costs were ordered to be paid by the liquidator, which order (c) reads:

> ...that the petitioner be allowed the costs of and incidental to the winding-up to be taxed by the proper officer of the court and be paid by the appointed liquidator out of the assets of the company.

The order has long been perfected and it is clear law that this court is functus officio. It is not within the powers of this court, nor even the court that gave that order, to have it amended to include that the receiver and manager must pay the taxed costs.

I find the submission of counsel for the petitioner, to the effect that an order for costs is within the court's discretion, to be not worthy of any consideration as the situation here is not the consideration the court had to take into account before it awards a party costs but it is clearly a case where a competent court had dealt with the case and had considered the matter of costs and duly made an order as to who is to pay and how it is to be settled.

The terms of the order is crystal clear. It is for the liquidator to complete his work and part of which was to pay the petitioner's costs as directed by the court. If for any reason he is unable to do so then he must seek the court's direction.

As I have said, in the face of the clear terms of the order, the petitioner's motion against the receiver and manager for the repayment of taxed costs is misconceived and no useful purpose can be served by attempting to interpret which is the section of the Companies Act which provides the answer to the situation in this matter. Any attempt in the exercise of that discretion would lead to an attempt to amend the order granted. On this ground I dismiss the motion against the receiver and manager for the reasons I have given.

As for the motion against the liquidator, it is also equally misconceived like the motion against the receiver and manager. In a similar manner an order had been granted the terms of which is plain and obvious that the appointed liquidator is to pay the taxed costs out of the assets of the company. Apart from the court being functus to vary it, the granting of an order now that the liquidator must pay costs is academic and repetitive of it. This motion is therefore dismissed with costs to the liquidator and the receiver and manager to be taxed. I order accordingly.

Motion dismissed

Solicitors: *Ong Ban Chai & Co; Abraham & Partners.*

Reported by *Seah Min Wai*

Malayan Banking Bhd v Pendaftar Hakmilik, Negeri Pahang & Anor

HIGH COURT (KUANTAN) — ORIGINATING MOTION NO 25-15-89
LAMIN J
25 SEPTEMBER 1990

Civil Procedure — Caveat — Application to remove by originating summons — Whether correct mode — Whether applicant appropriate party to bring action — National Land Code 1965, ss 321 & 418

The applicant in this case applied for an order by way of an originating motion that the registrar 'be directed to remove the Registrar's Caveat No 601/88 Jilid 26 Folio 54 registered on that piece of land held under HS(M) 13362 PT No 947/34, mukim Kuala Kuantan'. The applicant was the registered chargee of the said land which was charged to secure a loan of $77,000 from the applicant in favour of the chargor. As the chargor had been in default of the loan, he therefore approached the applicant with the view of disposing of the charged property to a third party by way of a private sale in order to satisfy the debt. However this arrangement could not be finalized as a search at the Land Office Kuantan revealed that a registrar's caveat had been registered against the charged land on the ground that the chargor had not paid her income tax.

Held, dismissing the application:

(1) The present application should have been before the court by way of an appeal under s 418 of the National Land Code 1965. The wording of the said section is clear and unambiguous in that the legislature has laid down one and only one mode of procedure by which an aggrieved party may obtain redress before the High Court.

(2) As the present case relates to a registrar's caveat and under the Code it is the registrar who has to decide whether to register a caveat in any particular case as it 'appears to him to be necessary or desirable' for any of the purposes as stipulated under s 320(1) of the Code, if any party is aggrieved by the registrar's decision then it must be his decision that has to be examined or questioned.

(3) As the purpose of the present application is to have the registrar's caveat cancelled then it is the proprietor of the land (and in this case it must be the chargor) who must first apply to the registrar to have the registrar's caveat cancelled as required under sub-s (3)(b) of s 321. If the registrar refuses to cancel it, then the proprietor of the land being the aggrieved party (and not the chargee who is the applicant in this case) may take the matter up on appeal to the High Court.

(4) In the present case, there is no evidence that the proprietor of the land has applied to the registrar for the cancellation of the caveat and there is no evidence of the decision of the registrar's refusing to cancel it as to constitute a ground for an appeal by the owner of the land under s 418 of the Code.

[Bahasa Malaysia summary

Pemohon di dalam kes ini memohon melalui usul pemula supaya pendaftar 'diarahkan supaya mengenepikan kaveat Pendaftar No 601/88 Jilid 26 Folio 54 yang didaftarkan atas tanah yang dipegang dibawah HS(M) 13362 pt No 947/34, mukim Kuala Kuantan'. Pemohon adalah pemegang caj berdaftar tanah itu yang telah dicaj untuk menjamin pinjamin sebanyak $77,000 daripada pemohon kepada penggadai. Oleh kerana penggadai telah gagal membayar balik pinjaman itu,